



Canada-United States Law Journal

Volume 10 | Issue

Article 32

January 1988

Federalism and Foreign Economic Relations

John Quinn

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

John Quinn, *Federalism and Foreign Economic Relations*, 10 Can.-U.S. L.J. 197 (1985)
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol10/iss/32>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Federalism and Foreign Economic Relations**

by John Quinn*

I. INTRODUCTION

The main economic challenge for Canadians is to transform the structure, and consequently the performance, of our national economy in order to compete successfully in an increasingly demanding world trade environment. For a small open economy, external trade policy must play the leading role in facilitating the industrial adjustments required. Secure access to export markets will be an indispensable first step in triggering the investment decisions that will be needed to fuel Canada's economic transformation.

Improved access to foreign markets can, however, only be achieved through the reciprocal reduction of Canadian barriers to imported goods and services. While border measures such as tariffs and quantitative restrictions fall within the exclusive jurisdiction of the federal government, many non-tariff barriers arise from laws and regulations adopted by provincial governments, such as government procurement practices, subsidies to local industries, and consumer product standards. The effective representation of Canadian interests in future multilateral and bilateral trade negotiations will require the federal and provincial governments to achieve a consensus on the substance of the commitments to be offered and the methods to be employed in implementing treaty obligations.

The existing constitutional design for allocating legislative powers between the coordinate levels of Canadian government is predicated upon a high degree of jurisdictional overlap and shared responsibility for the diverse range of policies which impact on foreign economic relations. The recent expansion of international law making activity into areas of provincial legislative competence has coincided with the steady growth of provincial programs and regulations covering activities such as agriculture, manufacturing, and resource development which are closely linked to external trade and investment flows.¹ The taxes, subsidies and regula-

** The author is indebted to Pat Monahan and Rob Prichard for their comments on this paper.

* Associate Professor, Osgoode Hall Law School (Downsview, Ontario). Professor Quinn was a Research Coordinator (Law) for the Royal Commission on the Economic Union and Development Prospects for Canada. He has served as the Canadian Director of the Canada-U.S. Law Institute and is the author of numerous publications dealing with trade issues.

¹ See, Stairs, *Devolution and Foreign Policy: Prospects and Possibilities*, in *OPTIONS: PROCEEDINGS OF THE CONFERENCE ON THE FUTURE OF THE CANADIAN FEDERATION* 142-145 (1977); HON. M. SHARP, *FEDERALISM AND INTERNATIONAL CONFERENCES ON EDUCATION: A SUPPLEMENT TO FEDERALISM AND INTERNATIONAL RELATIONS* (1968).

tions employed in pursuit of provincial industrial policy objectives have frequently been used to control inward flows of goods and capital in accordance with the interests of politically influential producer groups concentrated in particular provinces. There is a risk that future jurisdictional disputes may arise if provincial economic or social policies conflict with federal initiatives to remove or reduce the restrictive effects of laws and regulations which limit access to the Canadian market.

In light of the challenging agenda of foreign economic policy issues that must be confronted in the coming decades, it is essential to assess the potential impact of Canada's highly decentralized federal system of decision making on the effective management of external economic relations. What are the advantages and disadvantages that inhere in the conduct of foreign economic relations under our existing federal legal structure? If the current scheme of overlapping legislative powers is a substantial impediment to the achievement of our external economic policy goals, what institutional reforms hold out the prospect of superior results?

This paper attempts to answer these questions through the identification and analysis of the major provincial laws and regulations that are likely to figure prominently in future multilateral and bilateral trade negotiations. The key issue is whether the federal government could act unilaterally to supersede or nullify provincial legislative or administrative acts which conflict with the obligations imposed by validly contracted international economic treaties. In light of the existing constitutional limitations on federal authority to implement international agreements, the paper examines the prospects for effective cooperation between the two levels of government in the absence of any major legal or institutional changes in the current balance of constitutional power. It concludes with an assessment of several options for reform designed to enhance our nation's capacity to act decisively in securing the maximum potential benefits from global economic development.

II. PROVINCIAL NON-TARIFF MEASURES

Provincial taxes, regulations, and subsidies which protect industries enjoying the economic salience and political influence to win strong support in provincial cabinets are often referred to as "non-tariff measures" in the legal and economic literature analyzing international trade relations.² This approach to classifying laws and regulations with discriminatory consequences is somewhat confusing because many of these measures, like tariffs on imports, involve explicit discrimination against foreign and often out-of-province producers. For example, provincial government procurement regulations often include explicit provisions which require that preferences be accorded to prospective contractors

² For an excellent discussion of the economic and political consequences of non-tariff measures, see Prichard, *Securing the Canadian Economic Union*, in *FEDERALISM AND THE CANADIAN ECONOMIC UNION* 5-15 (1983) [hereinafter cited as *FEDERALISM*].

who conduct a substantial proportion of their business activities within the province concerned.

Provincial statutes or regulations requiring that mining and forestry companies process or refine raw materials before exporting them beyond provincial boundaries are another example of explicit discrimination against out-of-province competitors. Provincial policies which provide implicit protection against imports include such measures as industrial subsidies that displace imported products, and product content and design standards that impose unnecessary cost burdens on foreign producers of competing goods. Explicit forms of protection are usually more amenable to economic analysis and quantification of their actual consequences for industrial efficiency and income distribution. But this is not always the case since some policies of explicit protection may be administered through highly discretionary and confidential executive decision-making processes (e.g., government contracting, natural resources licensing, government liquor distribution, etc.).

Implicit protection is often the result of policies and programmes designed to protect consumers from unsafe products or to prop-up declining industries in order to ameliorate the social and human costs of long-term unemployment. Whether discrimination against imports is an intended or unintended consequence of subsidies or regulations, negotiations to limit these barriers can be politically controversial if provincial producers, who benefit from the implicit protection, can enlist the aid of other interest groups attracted by the social and humanitarian aims of these measures.³

The following summary of provincial non-tariff measures is not an exhaustive catalogue, but rather represents an effort to identify the major legal forms of trade protection at the provincial level, and the basic types of economic activity affected by them. This representative survey of provincially induced barriers to imported goods and services is derived from recent studies that have focused primarily on government-created impediments to interprovincial trade. These studies indicate that the majority of provincial industrial policies, which aim at creating new industries or easing adjustments in declining sectors, injure more efficient producers in other provinces as severely as they harm foreign competitors.⁴ Thus, many of the provincial laws and regulations surveyed here raise serious concerns, not only for future trade negotiations, but also for the integration and efficiency of Canada's internal economic union.

The emphasis on provincial non-tariff measures in this part of the paper should not be taken to suggest that central government policies

³ See, e.g., Mique, *Trade Barriers, Regulation and Bureaucratic Supply as Alternative Instruments of Wealth Transfers*, in J. QUINN & P. SLAYTON, *NON-TARIFF BARRIERS AFTER THE TOKYO ROUND* 103-113 (Inst. for Research on Pub. Policy 1982).

⁴ These studies are summarized in Whalley, *Induced Distortions of Interprovincial Activity: An Overview of Issues*, in *FEDERALISM*, *supra* note 2, at 161-200.

have minor or secondary impacts on the interprovincial distribution of economic activity and income. Federal tariffs, energy taxes, and transport subsidies benefit consumers and producers in some regions and particular provinces while imposing their costs on others. Recent calculations done by Whalley suggest that federal taxes and subsidies create more costly impediments to national economic integration than provincial non-tariff measures, and these measures are also likely to figure prominently on the agendas for future multilateral and bilateral trade negotiations.⁵

To an unknown but probably significant extent, provincial non-tariff measures have been motivated by a desire to countervail federal trade, tax, and regulatory policies with regionally discriminatory impacts. This pattern of federal-provincial conflict over the speed and direction of economic development reflects one of the primary disadvantages of an overlapping scheme for the sharing of legislative powers between the two levels of government in a federal structure. In effect, each level of government retains the constitutional authority to obstruct or neutralize progress towards policy goals established by the other.⁶ For a small open economy faced with intensifying competition in its domestic and export markets, a coherent and comprehensive approach to defining government's promotional and regulatory role in economic development is likely to be of increasing importance in future decades. The following list of provincial non-tariff measures demonstrates the present scope for cross-cutting wasteful conflicts with federal policies.

A. Provincial Purchasing Policies

Preferences for within-province contractors in bidding for government purchases of goods and services exist in all ten provinces.⁷ Discrimination in favor of provincial suppliers is achieved through a wide variety of techniques. The most explicit methods involve residency or place-of-manufacture requirements employed either as a condition for participation in the bidding process or as the basis for granting a cost preference to local suppliers, usually expressed as a percentage of the value of the contract involved.

But most procurement regulations that provide for specific levels of explicit protection also incorporate vague discretionary standards which permit purchasing officials to grant additional preferences to local firms in competition with out-of-province suppliers. For example, Quebec's

⁵ See Whalley, *The Impact of Federal Policies on Interprovincial Activity*, in *FEDERALISM*, *supra* note 2, at 218-36; see also, A. SAFARIAN, *TEN MARKETS OR ONE? REGIONAL BARRIERS TO ECONOMIC ACTIVITY IN CANADA* (Ontario Econ. Council 1980).

⁶ For an insightful analysis of the consequences of jurisdictional overlap for both external and domestic economic policies see Courchene, *Analytical Perspectives on the Canadian Economic Union*, in *FEDERALISM*, *supra* note 2, at 65-110.

⁷ Trebilcock, Whalley, Rogerson & Ness, *Provincially Induced Barriers to Trade in Canada: A Survey*, in *FEDERALISM*, *supra* note 2, at 242-47 [Hereinafter cited as Trebilcock].

purchasing policy establishes a 10% margin of preference for Quebec-based firms, but it also provides for an additional unspecified degree of favoritism for local firms when awarding them the contract would promote provincial "industrial development objectives."⁸ The Order-in-Council setting out Quebec's procurement rules does not define what is meant by "industrial development objectives." This legal ambiguity allows the executive and administrative officials who manage procurement policy to choose the degree of preference to be accorded local suppliers on a wholly case-by-case basis.

Most provincial purchasing policies implicitly authorize systematic discrimination in favor of local suppliers merely by conferring broad discretionary powers on cabinet ministers to award public contracts. There are a variety of administrative techniques employed to conceal discrimination against out-of-province bidders:

- (1) performance requirements specified in formal invitations for tenders may be tailored to match technical capabilities or preexisting proposals of within-province firms;
- (2) use of selective or "single tender" schemes incorporating discriminatory methods for choosing "qualified" bidders; and
- (3) various procedural barriers, such as inadequate publicity of information on bidding opportunities, or very short time limits for the submission of bids.⁹

The most effective legal strategy for controlling discrimination in procurement systems aims directly at curbing the discretionary authority of ministers and departmental officials. Effective constraints on discretion require external audits, independent review bodies, mandatory reporting and "transparency requirements" such as the provision of written reasons for awarding contracts and standardized notice and information disclosure rules.¹⁰ Future multilateral and bilateral trade negotiations are likely to involve proposals that both central and sub-national governments undertake to impose some or all these legal controls on their procurement processes.

The new GATT code on procurement enacts a fairly weak anti-discrimination regime although it does take some significant first steps towards improving transparency and thereby controlling discretionary acts of favoritism. During the negotiation of this code, the federal and provincial governments consulted on the prospects for mutual commitments to limit discriminatory procurement practices, but at the conclusion of the trade talks it was agreed that it was inadvisable to offer specific pro-

⁸ Regulation Respecting Government Purchase Contracts, O.C. 2591-77 (1977), 109 (37) Que. Off. Gaz. II 4655 (10 Aug. 1977).

⁹ J. CHRETIEN, SECURING THE CANADIAN ECONOMIC UNION IN THE CONSTITUTION: DISCUSSION PAPER 32-34 (1980) (available from the Minister of Supply and Services Canada).

¹⁰ For a comparative analysis of legal techniques for controlling discrimination in government procurement see Graham, *Government Procurement Policies: GATT, the EEC and the United States*, in *FEDERALISM*, *supra* note 2, at 356-93.

vincial undertakings to implement the code. Rather than offer a binding commitment on behalf of the provinces, Canada merely repeated its pre-existing obligation under Article XXIV(12) of the GATT: to use its "best efforts" to promote provincial compliance with the procurement code.¹¹

Since the code's safeguards apply only to purchasing "entities" designated by the signatories, and Canada has not designated any provincial department or crown corporation as being covered by the code, the question of provincial compliance has not arisen under the GATT dispute settlement procedure. Given the approximately \$40 billion annually that is spent by provincial governments for goods and services, future trade negotiations are certain to involve requests by trading partners for improved access to procurement markets.¹² Since most provincial governments own or control a wide variety of commercial enterprises (e.g., airlines, hydro companies, telephone companies, universities, railways, hospitals, etc.) discrimination in purchasing at the provincial level encompasses a large number of products and services exported by the U.S. and the E.E.C.

B. Regulated Services

1. Motor Vehicle Transport

Since 1954 the provinces have exercised regulatory authority over the interprovincial and international carriage of goods and passengers by trucks and buses. Provincial control is inconsistent with the ostensible division of powers enacted by section 92(10) of the B.N.A. Act. This interpretation was endorsed by the Supreme Court's 1951 decision in *Winner*, which dispelled any doubts concerning the federal government's exclusive jurisdiction over inter-provincial motor vehicle traffic.¹³ Nevertheless, the federal Parliament declined the opportunity to impose a uniform scheme of regulation, and enacted explicit legislation, now more than thirty years old, delegating its constitutional responsibility to the provinces.¹⁴ As a result, each province is able to control the activities of truck and bus carriers operating within its boundaries, even if the carriers only pass through the province on interprovincial trips. Since all of the provinces presently exercise their authority to regulate entry into the businesses of providing interprovincial trucking and bus services, there are ten different sets of motor carrier regulations across Canada. Recent studies on interprovincial motor carriage conclude that most barriers to competition occur as a result of lack of uniformity among provincial reg-

¹¹ See de Mestral, *The Impact of the GATT Agreement on Government Procurement in Canada*, in J. QUINN AND P. SLAYTON, *NON-TARIFF BARRIERS AFTER THE TOKYO ROUND 171-82* (Inst. for Research on Pub. Policy 1982).

¹² Trebilcock, *supra* note 7, at 267.

¹³ *Winner v. S.M.T. (Eastern) Ltd.*, 1951 S.C.R. 887.

¹⁴ See Bonsor, *The Impact of Regulation on For-Hire Highway Carriers*, in III ECONOMIC COUNCIL OF CANADA, *STUDIES OF TRUCKING REGULATIONS: WORKING PAPER No. 3* (1980).

ulations and taxes rather than from deliberate discrimination against out-of-province carriers.¹⁵

The main concern for external trade relations is the treatment accorded U.S. carriers who apply to provincial regulatory boards for licenses to offer their services to Canadian shippers and passengers. Some provinces discriminate against U.S. carriers by prohibiting firms controlled by foreign residents from holding both intraprovincial and extraprovincial operating licenses. Others have allegedly adopted tacit policies of refusing carriage licenses to U.S. applicants. For example, the Ontario Highway Transport Board possesses broad discretionary powers to control entry to all commercial vehicle routes in the province.¹⁶ During the 1970's, there were several notable instances in which U.S. carriers were either denied permission to enter the Ontario market, or were granted operating licenses with special route and customer restrictions designed to protect Canadian licensees.¹⁷

In 1980, the U.S. government made formal complaints concerning alleged discrimination against U.S. owned trucking firms by the Ontario Board, and threatened retaliation against Canadian truckers, most of whom derive a significant amount of revenue from transborder shipments. Since these complaints were subsequently settled through confidential negotiations and an exchange of notes, there was never any definitive finding on whether or not the Ontario Board was discriminating against U.S. firms.¹⁸ Objective evidence of an intent to discriminate by government regulators is often difficult to obtain in these types of trade disputes. The U.S. trucking complaints in 1980 and 1981 coincided with a recessionary market environment and surplus capacity problems for Canadian carriers. If most Canadian applicants for route licenses were also being denied entry into the market during this period, proof that no U.S. applicants were granted licenses, without additional corroborating evidence of discriminatory intent, would not have established a very persuasive claim for remedial action.

The difficulty of proving discrimination in regulatory activities, such as licensing, parallels the enforcement problems emphasized earlier in regard to provincial procurement decisions. When foreign producers can be excluded from markets through the exercise of discretionary powers, which permit officials to act on subjective judgments founded on vague statutory criteria, a substantial amount of implicit discrimination against foreign bidders and license applicants is virtually inevitable. The only

¹⁵ See Trebilcock, *supra* note 7, at 249, 267.

¹⁶ Bonsor, *The Development of Regulation in the Highway Trucking Industry in Ontario*, in ONTARIO ECONOMIC COUNCIL, *GOVERNMENT REGULATIONS: ISSUES AND ALTERNATIVES* (1978).

¹⁷ See, e.g., Palmer, Quinn & Resendes, *A Case Study of Public Enterprise: Gray Coach Lines Ltd.*, in CROWN CORPORATION IN CANADA 380-87 (1983).

¹⁸ OFFICE OF THE U.S. TRADE REPRESENTATIVE, *ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM* 73 (1984).

effective legal technology for limiting this form of discrimination is to constrain official discretion through the imposition of more concrete decisional standards and more transparent procedures.

In future external trade negotiations, it is probable that the provinces will be asked to accept these more effective controls on their ability to grant implicit protection to resident producers.¹⁹ Whether the federal government could accept a treaty obligation to impose such anti-discrimination measures, and subsequently compel dissenting provinces to conform, is a question that is best deferred until the next part of this paper, which analyzes the constitutional issues. In regard to provincial licensing of extraprovincial motor carriage, no difficult constitutional questions are involved since the federal government need only repeal the 1954 statute which delegates its legislative powers over these activities to the provinces.

2. Financial Services

There is a close functional link between regulations aimed at tradeable services and laws concerning foreign ownership of particular types of business. In the field of financial services such as insurance, banking, and investment brokerage, the two types of regulation are indistinguishable in a practical sense because foreign firms must establish local outlets or branches in order to market their services in a commercially viable manner. The provinces generally exercise constitutionally valid control over financial institutions other than banks, including savings and trust companies, investment dealers, consumer lending firms, and insurance companies. Explicit discrimination against foreign financial firms occurs in many provinces through statutory provisions barring foreign-controlled businesses from entering regulated financial services markets.²⁰ Moreover, it has been asserted that discriminatory policies are tacitly imposed to keep U.S. security dealers and insurance firms out of some provincial markets.²¹

Provincial regulation over financial services does not, however, usually extend to direct controls on the number of firms permitted to enter local markets, and therefore does not generally provide the broad discretionary power required to implement an effective policy of tacit discrimination against foreign entrants. Nevertheless, the U.S. government has indicated that it will attempt to negotiate for the removal of foreign ownership restrictions applicable to the financial services industries in future

¹⁹ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL SERVICES STUDY 246-63 (1983).

²⁰ See Safarian, *Government Control of Foreign Business Investment*, in 12 ROYAL COMM. ECON. UNION AND CAN. ECON. DEVELOPMENT PROSPECTS, DOMESTIC POLICIES AND THE INTERNATIONAL ECONOMIC ENVIRONMENT 21-27 (1985).

²¹ See R. ROBINSON, NATIONAL CONTROL OF FOREIGN BUSINESS ENTRY: A SURVEY OF 15 COUNTRIES 220-26 (1977).

comprehensive trade talks with Canada.²²

C. Agricultural Policies

All the provinces employ three basic legal instruments to protect local agricultural producers: agricultural marketing boards, agricultural subsidy programs, and restrictive product standards and quality regulations. The marketing boards operated by the provinces are organized under federal legislation, the Farm Products Marketing Agencies Act.²³ This Act authorizes the federal Minister of Agriculture to create national supply management regimes for particular agricultural commodities when a substantial majority of Canadian producers favor quotas. When controls are imposed on a product, the Act requires the creation of a federal agency to establish a national quota and to allocate shares of production among the provinces. Provincial marketing boards allocate production quotas among their resident producers and manage eligibility and enforcement matters.

Currently, there are five products regulated under the federal scheme: wheat, eggs, chickens, turkeys, and industrial milk. Since the federal government has exclusive constitutional jurisdiction to apply quantitative restrictions on products moving in international commerce, provincial supply management for most agricultural products would be ineffectual without federal quotas to exclude lower cost U.S. producers. Therefore, the federal government's ability to withdraw indispensable trade protection from provincial supply control schemes increases its bargaining leverage to secure provincial government compliance with international trade agreements concerning agricultural products.

Provincial supply management boards can create barriers to out-of-province and U.S. producers by enacting discriminatory rules concerning the distribution and marketing of agricultural products. Since marketing, distribution, and processing are economic activities that usually take place wholly within provincial boundaries, there is broad constitutional scope for protecting in-province producers through transport and handling regulations, testing procedures, grading and labeling standards, and health regulations that implicitly discriminate against out-of-province and U.S. suppliers.

In some cases discriminatory regulations can prevent any trade with out-of-province suppliers. For example, the Ontario Milk Board requires all producers to be inspected by provincial inspectors before they can sell milk in Ontario, but the inspectors will not travel to conduct inspections outside the province.²⁴ More frequently, the adoption by provincial regulators of different product standards or packaging requirements increases the added cost burden that out-of-province suppliers face when

²² See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 18, at 107-11.

²³ Farm Products Marketing Agencies Act, ch. 65, 1970-71-72 Can. Stat.

²⁴ Trebilcock, *supra* note 7, at 256.

entering local markets, and thus protects the market shares of local firms. A recent study by Haack, Hughes and Shapiro identifies dairy product standards, packaging rules, vegetable grading standards, and fruit and vegetable inspection practices as non-tariff measures which are currently employed by provincial governments to restrict trade in agricultural products.²⁵

Finally, many provinces have established subsidy programs to assist local producers in competing with out-of-province suppliers. Most of this aid to resident farmers takes the form of direct cash grants and subsidized credit. A recent study based on 1981 data estimated that the provinces now pay an annual average per capita subsidy of about \$50 to the farm products sector.²⁶ Moreover, most provinces also maintain promotional support programs which use advertising and other marketing strategies to differentiate local products from out-of-province substitutes. As indicated in the next section, the existing division of federal-provincial powers may effectively insulate these direct and indirect subsidies from any form of unilateral federal control.

D. Natural Resource Policies

Most provinces employ a number of complementary legal instruments to promote and protect domestic natural resource industries. First, all provinces levy some form of mining or severance tax on income derived from natural resources. Also, most grant "processing allowances" which permit firms to deduct a specified percentage of the costs of processing or manufacturing assets used within the province from income subject to mining taxes, a tax deduction denied to taxpayers with out-of-province facilities.²⁷ Several provinces have also attempted to increase local processing of natural products by imposing direct taxes on the export of unmanufactured natural resources. For example, British Columbia taxes raw timber exported from the province in order to depress domestic log prices paid by local processors to below world market levels.²⁸ Moreover, the British Columbia Mineral Processing Act requires that all British Columbia minerals be processed in the province if appropriate facilities have unused capacity, and authorizes the responsible minister to issue directives compelling mining and mineral firms to comply with this requirement.²⁹ Alberta, Saskatchewan, Quebec and New Brunswick have similar policies regarding the processing and extra-

²⁵ HAACK, HUGHES & SHAPIRO, *THE SPLINTERED MARKET: BARRIERS TO INTER-PROVINCIAL TRADE IN CANADIAN AGRICULTURE* (Can. Inst. Econ. Policy 1980).

²⁶ Trebilcock, *supra* note 7, at 258.

²⁷ See, e.g., *Loi des droit sur les mines*, ch. D-15, 1977 L.R.Q. §30, amended by la Loi modifiant la Loi concernant les droits sur les mines, ch. 74, 1979 L.R.Q. §2; ch. 269, 1980 R.S.O. §3(a).

²⁸ See Haley, *A Regional Comparison of Stumpage Values in British Columbia and the United States Pacific Northwest*, 56 *THE FORESTRY CHRON.* 225-30 (Oct. 1980).

²⁹ British Columbia Mineral Processing Act, B.C. REV. STAT. ch 261, §2 (1979); see Trebilcock, *supra* note 7, at 262-63.

provincial shipment of natural resources.³⁰

Another way in which provinces can shape the development of their resource industries is through direct subsidies and tax deductions related to exploration and allied costs. These subsidies and tax exemptions can have significant impacts on external trade flows because of the relatively high proportion of natural resource exports from many provinces. Several of the largest recent U.S. countervailing duty cases have involved Canadian natural resource and agricultural products: softwood lumber, fish, potatoes and pork. All four industries receive direct or indirect aid from various provincial governments, depending on their relative political influence in particular provincial cabinets and legislatures.³¹

E. Industrial Subsidies

All the provinces have a variety of incentives to attract new industries or to prop up old ones. These industrial subsidies encompass grants, loans, loan guarantees and equity investments by provincially owned or controlled financial institutions. They also include indirect forms of assistance through government supply of support services, infrastructure investment, research and development projects, and export market development services. To an increasing extent over the past decade, provincial assistance programs have received substantial amounts of federal funding under a federal-provincial arrangement called the General Development Agreements.³² Each of the provinces signed a cost-sharing agreement with the federal Department of Regional Economic Expansion (DREE) under the Trudeau government, and it appears that the new government will continue these arrangements for coordinating subsidy programs.

Although provincial incentive programs involving federal cost-sharing account for the most direct forms of assistance, a substantial amount of provincial aid is also provided through special deductions and exemptions from corporate income taxes. Moreover, many provincial cabinets have adopted the practice of granting subsidies on an *ad hoc* basis to attract out-of-province investors or to bail out insolvent local enterprises. Incentive packages offered to foreign investors by one province often trigger competing bids from other provincial governments. The federal government has been required to act as a mediator in several recent disputes between provinces over competing bids to attract new projects in the manufacturing and high technology sectors.³³

³⁰ See Trebilcock, *supra* note 7, at 262-66.

³¹ For a comprehensive catalogue of provincial subsidy programs see *id.* at 323-51.

³² For a description of the General Development Agreements program see, ECONOMIC COUNCIL OF CANADA, INTERVENTION AND EFFICIENCY 87-102 (1982) (available from Minister of Supply and Services Canada).

³³ For a discussion of provincial subsidy policies during the 1970's see M. JENKIN, THE CHALLENGE OF DIVERSITY: INDUSTRIAL POLICY IN THE CANADIAN FEDERATION 121-39 (Econ. Council Can. 1983).

F. Provincial Liquor Policies

All the provinces maintain some degree of monopolistic control over the distribution and marketing of alcoholic beverages. Provincial liquor boards have adopted several types of discriminatory practices designed to protect local producers of liquor, wine and beer. British Columbia, Ontario and Quebec allow locally produced beverages a preferential price markup.³⁴ For example, in British Columbia local table wines are marked up by only 50% while similar wines imported from abroad or other provinces are marked up 110%.³⁵ Provincial liquor outlets also favor local products by providing preferential advertising and promotional support such as carrying larger inventories and more varieties of domestic beverages. For example, wines produced outside Ontario can only be distributed through provincial retail stores, while Ontario wineries may also sell through their own retail outlets.³⁶ There are approximately 150 winery-owned outlets currently operating in Ontario.

During the Tokyo Round, Canada negotiated for improved access to the U.S. and E.E.C. markets for bottled and bulk whiskey exports. The Europeans and Americans countered with proposals for reducing provincial discrimination in the retailing of imported alcoholic beverages. Federal-provincial consultations on these proposals concluded with a joint "statement of intent" endorsed by all ten provincial governments. The statement contained two basic commitments on preferential pricing for local products: (1) mark-up differentials between domestic and imported distilled spirits could only be based on "normal commercial considerations" (e.g., higher handling or marketing costs); and (2) mark-up differentials between domestic and imported wines would be frozen at 1979 levels unless a future increase could be justified by "normal commercial considerations."³⁷

Since the Tokyo Round, signatories of the statement have disagreed about its legal consequences for the provinces. Both federal and provincial participants in the Tokyo Round have agreed that the statement was not meant to create any formal legal obligation for the provinces, either to Ottawa or Canada's trading powers. Recent federal governments have resisted the notion of any provincial constitutional authority to conclude valid treaties with foreign nations.³⁸ Moreover, both Ottawa and the provinces have been reluctant to press the issue of the legal enforceability

³⁴ See Trebilcock, *supra* note 7, at 263-66.

³⁵ See HAACK, HUGHES & SHAPIRO, *supra* note 25, at 41-53.

³⁶ Liquor Control Act, ONT. REV. STAT ch. 243, §3(a) (1980). As of March 31, 1983, Ontario wineries had 154 wine stores in the province, an increase of 34 outlets over the previous year. ONTARIO LIQUOR CONTROL BOARD, 57TH ANNUAL REPORT 16 (1983).

³⁷ DEP'T OF INDUS., TRADE AND COM., GOV'T CAN., MULTILATERAL TRADE NEGOTIATIONS 1973-79, 98-9 (1980) (Available from Minister of Supply and Services Canada).

³⁸ For a good discussion see Szablowski, *Treaty-Making Power in the Context of Canadian Politics: An Exploratory and Innovative Approach*, in 57 ROYAL COMM. ECON. UNION AND CAN. ECON. DEVELOPMENT PROSPECTS, RECURRING ISSUES IN CANADIAN FEDERALISM (1985).

of intergovernmental agreements, in part because of a mutual desire to avoid a zero-sum conflict serious enough to endanger the large number of similar federal-provincial arrangements.

In a formal complaint under the GATT dispute settlement procedure, the E.E.C. has recently advanced an interpretation of the statement that conflicts with the federal-provincial position. The complaint challenges certain changes to Ontario's wine pricing rules, introduced in 1982 and 1983, on the ground that they violate the obligations imposed on provinces by the Tokyo Round statement.³⁹ These changes preserved the mark-up differentials between Ontario and imported wines at 1979 levels, as required by the agreement, but also imposed a new "handling charge" of 65 cents per bottle of foreign wine compared with 25 cents per bottle of domestic wine. When the handling charge was first initiated in 1982, the E.E.C., supported by the U.S., protested that the higher charge could not be justified in terms of any extra real costs entailed in marketing foreign wines, and that it amounted to thinly disguised intentional discrimination.

In 1983, after the U.S. indicated that it was considering retaliation against Canadian whiskey imports, Ontario removed the discriminatory charge on foreign wines, but at the same time, instituted a new system of "minimum reference prices." While the minimum prices apply uniformly to both domestic and imported wines, the E.E.C. argues that they discriminate implicitly against the cheaper brands of European wine. It claims that Ontario's current minimum price scheme virtually forecloses the provincial market from the cheapest brands of Italian and Spanish wine, and that the only logical motivation for the floor prices is to protect local wineries.⁴⁰ French, German and American wines were not adversely affected by the 1983 pricing changes because they are virtually all marketed in the medium and higher priced categories.

The E.E.C. complaint against Canada raises the issue of Ottawa's legal obligation to attempt to secure provincial compliance with international trade agreements. Article XXIV(12) of the GATT requires a national government to "take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory." Since there are no direct precedents on the meaning of the GATT's "best efforts" rule for federal states, the E.E.C. claim raises novel questions concerning the coercive measures that Ottawa may be legally compelled to take against provinces that refuse to implement GATT rules.

If Ottawa believes that Ontario's minimum reference prices violate Canada's treaty obligations, does Article XXIV(12) require the federal

³⁹ Fairley, *Constitutional Aspects of External Trade Policy*, in 62 ROYAL COMM. ECON. UNION AND CAN. ECON. DEVELOPMENT PROSPECTS, CASE STUDIES IN THE DIVISION OF POWERS 47-48 (1985).

⁴⁰ *Id.* at 50.

government to initiate a formal constitutional challenge to the provincial rules? The option of legal proceedings against Ontario is certainly a measure that is available to Ottawa, and the outcome of a constitutional challenge to the minimum price scheme is sufficiently uncertain so that it would be reasonable to require the federal government to test the limits of its authority to secure Ontario's compliance. The central legal issue in the E.E.C.'s complaint devolves into a question about the division of legislative powers under the B.N.A. Act. In short, if Ottawa had the constitutional authority to compel Ontario to cease discriminating against E.E.C. wine, and it failed to do so, then it would have violated the "best efforts" obligation of Article XXIV(12). On this interpretation of "best efforts" obligation, the GATT panel will be required to adjudicate the issue of whether Ontario's allegedly discriminatory pricing scheme for wine is *ultra vires* the scope of its legislative powers under section 92 of the B.N.A. Act. The next part of this paper considers that question.

III. CONSTITUTIONAL DOCTRINE

The B.N.A. Act of 1867 contained no general grant of legislative authority regarding the Dominion's external affairs beyond section 132, which only empowered the federal government to implement treaty obligations of Canada or of the provinces under agreements between the British Empire and foreign nations.⁴¹ When Canada became a fully independent member of the international community, Ottawa claimed the exclusive authority to conclude treaties with foreign nations. While this federal claim to plenary treaty making power has been challenged by Quebec over the past two decades, the courts have not yet been asked to decide whether provincial governments can negotiate and ratify international agreements on their own behalf.⁴²

The view adopted by a majority of commentators on this issue is that the royal prerogative power to conclude treaties was transferred by Britain to Canada alone, and that the federal cabinet therefore possesses the exclusive authority to create legally binding international obligations. Moreover, the Supreme Court of Canada's 1984 judgment in the *Newfoundland Off-Shore Mineral Rights* case acknowledged Ottawa's exclusive competence to conclude treaties and represent Canada in international fora, which suggests that the federal government would be likely to succeed in any direct challenge to provincial treaty-making.⁴³

The Privy Council's controversial decision in the *Labour Conventions* case held that the other component of legal authority over external

⁴¹ For a general discussion of the Canadian treaty-making power see Morris, *The Treaty-Making Power: A Canadian Dilemma*, 45 CAN. B. REV. 481-97 (1967).

⁴² For a good analysis of Quebec's legal position on the treaty-making power see Bernier, *Les affaires extérieures: la perspective juridique*, in CANADA AND THE NEW CONSTITUTION 189-215 (1983).

⁴³ For a discussion of these arguments see, Szablowski, *supra* note 38, at 51-62.

relations—the power to implement treaties—is divided between the two levels of government in accord with the B.N.A. Act's general scheme for allocating subject matter jurisdiction.⁴⁴ For example, because section 92 gives the provinces exclusive jurisdiction over property and civil rights, provincial governments can refuse to adopt legislation or regulations necessary to implement treaty obligations concerning these legislative subjects. The *Labour Conventions* doctrine denies the existence of any category of autonomous power to legislate for the purpose of implementing treaties.

This conception of treaty implementation is consistent with the absence of any express provision for such a power in the B.N.A. Act. Moreover, the denial of any implied federal power to implement treaties is consistent with a basic idea that is reflected throughout the division of powers jurisprudence—that constitutional provisions granting Ottawa broad general powers without objectively definable limits are to be given a narrowing construction in order to preserve a broad sphere of provincial regulatory autonomy. For example, federal powers over “trade and commerce” and matters affecting the nation’s “peace, order and good government” have been accorded limited scope in order to expand the purview of provincial jurisdiction over such subjects as property and civil rights and matters of a local nature.

Whyte's recent study concludes that the basic legal conception of Canada reflected in the division of powers cases is a federal community of partially autonomous, partially subordinate, states.⁴⁵ Whyte argues that this basic normative conception of the Canadian federation has led the courts to diminish the potential reach of the centralizing powers in section 91 of the Constitution in order to give effect to the notion of separated powers, an idea reflected in both the words and logical structure of the text. The absence of any general federal power to implement treaties seems consistent with Whyte's view of the division of powers doctrines created by the courts.

Thus, the *Labour Conventions* principle directs that Ottawa's authority to implement treaties, and to require provincial compliance, depends on whether the subjects regulated by particular treaties fall within recognized categories of federal legislative power. From the standpoint of trade treaties, the federal government's exclusive jurisdiction over international commerce provides textual support for the view that any provincial measure that requires or permits *explicit* discrimination against imports or exports is *ultra vires*. Such provincial laws and regulations

⁴⁴ For an historical analysis of the *Labour Conventions* case and its consequences see H. LEESON & W. VANDERELST, *EXTERNAL AFFAIRS AND CANADIAN FEDERALISM: THE HISTORY OF A DILEMMA* ch. 2,3 (1973).

⁴⁵ See Whyte, *Constitutional Aspects of Economic Development Policy*, in 61 ROYAL COMM. ECON. UNION AND CAN. ECON. DEVELOPMENT PROSPECTS, DIVISION OF POWERS AND PUBLIC POLICY (1985).

have been struck down, for example in the *Manitoba Egg* case,⁴⁶ because they aim directly at the extraprovincial flow of commerce.

Recent work by Fairley suggests that, while provincial taxes and regulations which expressly discriminate against foreign producers would generally exceed provincial authority, the same result might not ensue in litigation challenging provincial procurement or subsidy policies that confer competitive advantages on local producers.⁴⁷ The use of spending powers such as procurement preferences and the broad range of direct and indirect subsidy programs surveyed in the preceding section, in order to protect within-province firms from foreign competitors, has never been reviewed by the courts. Fairley argues that the courts might reasonably decide to accord more latitude to provincial spending and proprietary activities than to local taxes and regulations that are explicitly protectionist.

For most provincial non-tariff measures the constitutional question raised by conventional doctrine devolves into an attempt to characterize the true purpose of the local legislation or regulation; the actual economic consequences of the provincial measures are often given secondary weight in judicial analyses. For example, provincial subsidies that increase exports or reduce imports may be justified by reference to other constitutionally authorized aims, such as the provision of vocational training and stable employment. Provincial non-tariff measures which protect local firms through implicit discrimination (such as consumer product standards that increase the costs of foreign entrants or licensing schemes that conceal unequal treatment through vague discretionary criteria for granting licenses) are even more difficult to characterize as government actions motivated by the exclusive or primary objective of controlling international commerce.⁴⁸

Monahan's analysis of the Supreme Court's trade and commerce cases shows that a variety of provincial measures, many of which generated substantial impacts on external trade, have been upheld because their extraprovincial effects were found to be merely incidental to the valid provincial purpose of regulating transactions or activities taking place entirely within the province.⁴⁹ This approach to division of powers questions, which makes the legal outcome turn on the court's subjective characterization of legislative motives, allows broad latitude for judicial balancing of the competing arguments and interests favoring either federal or provincial control over important public policy decisions.

⁴⁶ *Attorney-General of Manitoba v. Manitoba Egg and Poultry Association*, 1971 S.C.R. 689, 692-94.

⁴⁷ See Fairley, *supra* note 39, at 41-6.

⁴⁸ For a good discussion of these arguments see, MacPherson, *Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglis*, 5 CAN. BUS. L.J. 172-213 (1980-81).

⁴⁹ Monahan, *At Doctrine's Twilight: The Structure of Canadian Federalism*, 34 U. TORONTO L.J. 47-63 (1984).

Monahan's recent work demonstrates that this case-by-case approach has not required the courts to formulate any coherent theory of federalism that explains and justifies the existing constitutional division of powers over trade and commerce.⁵⁰ Unlike Whyte, Monahan's analysis concludes that the overall result of existing division of powers doctrine is a crazy-quilt pattern of overlapping legislative powers which cannot be squared with any general organizing principle for assigning jurisdictional responsibilities within a modern federation.

The debate between Whyte and Monahan raises fundamental questions about the institutional competence of courts and whether the legal constraints imposed on judges preclude them from implementing any coherent normative view on the division of powers. These issues must be resolved in order to design effective arrangements for coping with jurisdictional conflicts between the two levels of government; they are discussed in the next part of this paper.

The question being analyzed here is whether existing constitutional doctrine strikes the most desirable balance between central coordination and provincial autonomy in making decisions linked with foreign economic relations. Whether Canada's overlapping scheme for allocating federal and provincial powers is normatively coherent or not, its main consequence in the field of external economic relations is that, through a range of policy instruments, provinces can choose to ignore or violate indirectly the provisions of international agreements concluded by Ottawa.

What are the strengths and weaknesses that inhere in the conduct of foreign economic relations through this overlapping structure of jurisdictional responsibilities? Many commentators believe that the current division of powers creates serious impediments to the effective management of Canada's external economic affairs.⁵¹ Foreign nations may be less willing to conclude advantageous agreements with Canada if Ottawa cannot provide credible assurances of future compliance. The alternative strategy of seeking unanimous provincial agreement to proposed treaty obligations carries with it the practical result that even one dissenting province may frustrate the conclusion of an arrangement that would confer substantial net benefits on the nation as a whole. This could be a serious problem in future trade negotiations because the regionally diversified nature of the Canadian economy ensures that provinces will often have conflicting political priorities on commercial policy issues. Moreover, the recent practice of seeking provincial endorsement of proposed trade agreements through non-binding "statements of intention" may not

⁵⁰ Monahan, *The Supreme Court and the Economy*, in 47 ROYAL COMM. ECON. UNION AND CAN. ECON. DEVELOPMENT PROSPECTS, THE SUPREME COURT OF CANADA AS AN INSTRUMENT OF POLITICAL CHANGE (1985).

⁵¹ See e.g., A. Leal, *Federal State Clauses and the Conventions of the Hague Conference on Private International Law* 20-27 Horace E. Read Memorial Lecture (Dalhousie Law School, Halifax 1983). See also HON. P. MARTIN, *FEDERALISM AND INTERNATIONAL RELATIONS* 13-19 (1968).

be sufficient to allay the fears of Canada's trading partners in light of the current E.E.C.-Ontario wine pricing dispute.

Those who argue for an expansion of federal legislative powers to implement foreign economic agreements also stress strategic considerations for managing trade and investment relations within a different constitutional framework than the current scheme of overlapping powers.⁵² In dealing with foreign nations, questions of timing and bargaining strategy may be crucial to Canada's success in the negotiations. The necessity of achieving federal-provincial consensus in advance of concluding an agreement may seriously handicap Canadian negotiators by risking the disclosure of strategically valuable information or preventing a swift response to last minute initiatives. Moreover, Stairs argues that the process of reaching concerted policy positions through confidential federal-provincial negotiations can erode the political accountability on which the parliamentary system is based since "legislative institutions at both levels of government are merely presented with a *fait accompli*."⁵³

Those who oppose any major change in jurisdictional assignments relating to foreign economic policies argue that the benefits derived from preserving provincial autonomy outweigh the costs of jurisdictional conflict and strategic disadvantage. The basic claim is that depriving provincial governments of a more or less coequal role in implementing trade agreements would bring about an undesirable shift of political power away from regionally based constituencies. In a country in which conflicting economic interests are defined along territorial lines, external trade and investment policies will often result in gains and losses being concentrated on particular regions or provinces.

It is argued that the residents of regions which must bear a disproportionate share of the burdens from trade policy changes deserve relatively more influence over those decisions than other national residents, and that the existing division of powers concerning treaty implementation institutionalizes this conception of political fairness. A high degree of jurisdictional overlap within the sphere of external economic relations protects regional minorities against national majorities by empowering the provinces to deploy policy instruments capable of buffering or insulating local communities from the effects of federal policy initiatives. In other words, federal tariff reductions can be indirectly resisted through subsidies, procurement preferences, and protectionist regulations if the tariff cuts disadvantage a local industry.

This overlapping pattern of jurisdictional responsibilities permits both levels of government to exercise different forms of legal control over the same activities and transactions. For example, the federal govern-

⁵² For a good statement of this argument see Morris, *The Treaty-Making Power: A Canadian Dilemma*, 45 CAN. B. REV. 478, 500-04 (1967).

⁵³ Stairs, *Foreign Policy*, in CANADA AND THE NEW CONSTITUTION 165 (Inst. Research on Pub. Policy 1983).

ment might attempt to implement a treaty banning discrimination in government procurement by enacting legislation prohibiting unequal treatment of foreign bidders by the provinces or, more likely, by suing to challenge the constitutional authority of provincial governments which persist in granting preferences to local firms. If the courts ruled in favor of Ottawa, the provinces could be required to remove explicit forms of discrimination, but it would be much harder for the courts and Ottawa to police *sub rosa* or implicit favoritism for local suppliers.

Could the federal government legislate a uniform procurement code, with objective criteria for choosing the winning bidder and highly transparent procedures, and attempt to enforce it against non-complying provinces? Under existing division of powers doctrine, the courts would be likely to hold that the adoption of a detailed code prescribing the exercise of provincial administrative functions exceeded the limits of federal authority. This example of how federal and provincial powers overlap in respect to procurement policies can be generalized to most of the other provincial non-tariff measures surveyed earlier. In the case of product standards, for example, the federal government might pass a statute prohibiting discrimination, but it probably could not implement Canada's treaty obligation by homogenizing product standards throughout the country.

Overlapping federalism may prove to be an increasingly costly method of protecting provincial autonomy in a highly competitive world trade environment. Can a nation with a relatively small internal market and regionally diversified economic structure produce world-class exporters when the regulatory and promotional policies of one level of government countervail and weaken the policy initiatives of the other? Moreover, provincial resistance to federal initiatives aimed at lowering trade barriers may undermine Canada's bargaining position in future negotiations. If national economic efficiency is impeded by provincial autonomy, competing objectives must be weighed in considering alternative legal mechanisms for promoting intergovernmental cooperation: maximizing national income versus preserving provincial control over social and economic changes impacting on local communities. From the standpoint of constitutional design, the critical choice is how national and regional interests will be represented in the body or institution charged with weighing and balancing these objectives when conflicts arise between them.

IV. INSTITUTIONAL CHOICES

The final part of this paper surveys two basic options for reform and compares these alternative strategies for institutional change with the constitutional status quo. One possible alternative to the existing system of overlapping responsibilities would be to centralize authority over the implementation of international agreements. A federal treaty power

could be linked with more fundamental reforms of federal institutions designed to improve the representation of provincial interests in the parliamentary process, such as the recent proposals for an elected Senate that would exercise approval powers over legislation enacted by the House. Alternatively, a federal treaty power amendment might be adopted without any compensatory reforms aimed at ensuring the provinces some meaningful role in the formulation of foreign economic policies.

The second basic strategy for reform focuses on strengthening existing intergovernmental arrangements to require federal-provincial coordination in the implementation of trade agreements and generally in the conduct of external economic relations. The problem of overlapping jurisdictions can be partially resolved by imposing a constitutional requirement that Ottawa and the provinces make joint decisions when implementing treaties affecting areas of shared responsibility. In order to prevent both levels of government from reneging, either directly or indirectly, on such agreements, this reform strategy would also incorporate an enforcement role for the courts, although the scope for judicial intervention will be narrower than under the first option involving a federal treaty power. A brief analysis of these two basic options should help to clarify their advantages and disadvantages in comparison with the present legal arrangements.

A. A Federal Treaty Power

Federal treaty powers have been included in both the U.S. and Australian Constitutions, although the specific legal arrangements that have been employed to centralize power over external affairs in these two nations are quite dissimilar. In many significant respects, the constitutional frameworks which shape foreign policy decisions in Australia and the U.S. represent alternative models or approaches to the core problem of all federal states—resolving conflicts between the regional and national interests which animate the democratic process.

In Australia, the power to make and implement treaties is exercised by the federal Parliament, a forum in which sparsely populated states have less influence than more populous ones. In the U.S., treaties are implemented through ratification by a two-thirds affirmative vote of the Senate, a body apportioned so that all the states have an equal number of voting representatives. The U.S. treaty power has not been frequently employed to implement international trade agreements because the federal legislative power over foreign commerce has been given an expansive interpretation by the courts, and no past Administration has negotiated an economic agreement concerning matters that were viewed as arguably within exclusive state jurisdiction.

If the U.S. Congress attempted to implement treaty obligations concerning product standards or government procurement practices by en-

acting legislation designed to override non-conforming state statutes and regulations, it would be likely to succeed on the basis of its authority over international commerce. In the improbable event that a state-initiated constitutional challenge to such federal legislation was sustained, the Administration could respond by presenting the agreement to the Senate for ratification as a formal treaty. Therefore, under the U.S. federal scheme, the decision making process that must be employed to diminish the constitutional authority of the states also operates to augment the influence of regional and local constituencies over the conduct of foreign relations.

Under the Australian scheme, state governments have no constitutional leverage to shape foreign economic policies and regional interests which would be affected by proposed international agreements must depend on political influence in the federal Cabinet and Parliament. The federal government's only concession to state government participation in the conduct of foreign relations has been its agreement to consult with the states prior to the conclusion of any significant treaty. The Australian consultation agreement also gives the state governments a first chance to draft and enact the legislation and regulations necessary to implement new treaties. This partial delegation of the central government's treaty power gives state government's some compensating influence over the technical details of implementation and the treaty's overall impact.

The U.S. approach to centralizing control over foreign economic relations has several important advantages over the present Canadian framework dictated by the *Labour Conventions* doctrine. First, it limits the scope for overlapping and conflicting policy initiatives while preserving strong incentives at the federal level to engage state and regional interests in the negotiation and implementation of treaties. The U.S. treaty power displaces state jurisdiction on a constrained, case-by-case basis. Moreover, the prospect of Senate ratification, with its inherent difficulties arising from the need to assemble a two-thirds majority in a body lacking effective party discipline, will often be perceived by the federal Administration as a second best solution to treaty implementation problems. This political disincentive to the invocation of the treaty power enhances the bargaining leverage of state governments and encourages negotiated solutions to intergovernmental conflicts over foreign economic policies.

A second advantage of the U.S. approach is that it diminishes the role of the courts in determining how power over foreign relations is allocated between the two levels of government. The *Labour Conventions* principle of shared responsibility for treaty implementation places great weight on the policy discretion of judges. The past performance of the judiciary in formulating principles for the constitutional division of powers does not inspire confidence that the courts are capable of providing consistent and coherent direction on the allocation of legislative powers over foreign affairs. The U.S. treaty power operates without any direct judicial control over the constitutionally permissible subjects of interna-

tional agreements, which take precedence over and nullify any non-conforming state law. While the courts do interpret and apply treaties in lawsuits challenging the validity of state laws and regulations, this enforcement role does not confer the broad policy discretion that Canadian (and U.S.) courts exercise in construing the meaning of constitutional provisions.

While the Australian approach to centralizing authority over foreign economic policy eliminates the problems of overlapping legal instruments and conflicting policies, it also deprives the state governments of any effective participation in the decision making process. In Canada, where many political conflicts over economic policy occur among interest groups that are divided along regional and provincial lines, the transfer of all legislative power over foreign affairs to the federal government would be widely regarded as unfair and a likely source of significant political problems for the government proposing it. In my view, any shift of legislative power to the central government should be accompanied by major institutional reforms aimed at improving the representation of provincial and local constituencies in the federal legislative process. In any event, any reduction in the existing jurisdictional authority of the provinces will require a constitutional amendment, and obtaining the support of seven provinces for such a change is certain to require some substitute arrangement for giving provincial interests an effective voice in foreign economic policy making.

One possibility would be to assign a role in the conduct of foreign economic affairs to a new Senate redesigned to provide each province with an equal number of representatives elected at large. An elected Senate could be given the responsibility for approving or ratifying international agreements in advance of their implementation by the federal government. This reform would necessitate the adoption of a Constitutional amendment providing that treaties approved by some specified majority of the new Senate are to be self-executing, *i.e.*, they would prevail over inconsistent provincial legislation.

B. Legally Binding Intergovernmental Agreements

An alternative to the strategy of a formal centralization of constitutional authority over foreign affairs is to require the two levels of government to make joint decisions on the implementation, and as a practical necessity the negotiation, of international agreements. A possible design for such a process could require that, before the implementation of any treaty dealing with matters falling within provincial jurisdiction, the federal government would submit the proposed agreement for the approval of an intergovernmental commission or body composed of one voting representative for each government. A "one government-one vote" rule specifying a two-thirds majority for approval would protect provincial interests and, at the same time, avoid the problem inherent in the *Labour*

Conventions approach of one or two dissenting provinces exercising a practical veto over new international agreements.

The creation of such a federal-provincial body would not involve a sharp break with existing arrangements for intergovernmental cooperation in the field of foreign relations. Informal mechanisms have evolved over the past two decades to facilitate the exchange of information and coordinate policies impacting on foreign economic relations. During the Tokyo Round negotiations, meetings between federal and provincial officials were convened at regular intervals to discuss bargaining objectives and the specific concessions to trading partners that would be offered to achieve them. However, the concrete results that were obtained through these consultations are not very impressive. The only substantive agreement was the non-binding "statements of intent" on liquor and wine pricing—the subject of the E.E.C.'s formal complaint under the GATT. Ontario's administration of its commitment on liquor pricing is not likely to allay the concerns of our trading partners about the value of similar non-binding undertakings in future trade negotiations. The primary advantage of a system of binding federal-provincial agreements will derive from the security of access they would offer our trading partners. Improving the reliability of our trade concessions will increase Canada's bargaining leverage to obtain better access for our exports.

A second advantage of binding intergovernmental agreements over the *Labour Conventions* approach is that they diminish the role of the courts in determining the balance of legislative power between the two levels of government. Binding agreements would entail an interpretive and enforcement function for the courts, but the agreements could be carefully drafted to limit the scope of judicial discretion to reallocate legislative powers. For example, the present problems of overlapping jurisdictions and countervailing legal instruments could be resolved through prohibitions and quantitative limitations aimed at specific types of taxes, regulations, and subsidies. This strategy for securing federal-provincial policy coordination would eliminate much of the legal uncertainty inherent in the *Labour Conventions* approach, which depends on a case-by-case judicial elaboration of the jurisdictional boundaries.

The main disadvantage of the intergovernmental agreements solution would be its adverse effect on the democratic accountability of the parliamentary system. In my opinion, the problem lies in the monopoly of power presently held by the cabinet in the Canadian version of parliamentary government. Reforms aimed at decentralizing power in the legislative process, such as stronger standing committees, better access to information concerning the consequences of government policies, and improved research support for the opposition parties, would be the best answer to the accountability problem.

